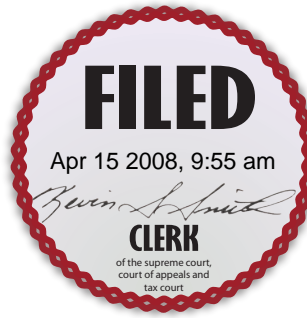


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

TIMOTHY W. WISEMAN
R. JAY TAYLOR JR.
Scopelitis, Garvin, Light, Hanson & Feary
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

TIMOTHY O. MALLOY
EDWARD C. LAWHEAD
Schreiner, Malloy & Etzler, P.C.
Highland, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

VERSTO, INC. d/b/a BVD TRUCKING,

Appellant-Defendant,

vs.

JAMES SMITH,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)
)

No. 93A02-0710-EX-907

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD
Application No. C-178151

April 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Versto, Inc., d/b/a BVD Trucking (“BVD”), appeals the decision of the Indiana Worker’s Compensation Board (“the Board”)¹ finding that James Smith is permanently and totally disabled and awarding him worker’s compensation benefits. We affirm.

Issues

BVD raises three issues, which we restate as follows:

- I. Whether the Board’s findings were sufficiently specific to permit intelligent review;
- II. Whether probative evidence supports the Board’s decision; and
- III. Whether Smith rebutted BVD’s evidence of reasonably available employment.

Facts and Procedural History

The parties submitted a trial stipulation, which reads in pertinent part:

1. That on or about August 19, 2003, Plaintiff, James Smith, was an owner/operator of a truck and trailer which he leased to Defendant, BVD Trucking.

2. Defendant BVD Trucking provided [Smith] with worker’s compensation insurance coverage pursuant to I.C. 22-3-6-1(b)(8).

3. That on or about August 19, 2003, while working in the course and scope of his employment as a truck driver for the Defendant, BVD Trucking, [Smith] sustained injuries to his left shoulder, left hip, left ribs, and neck as a direct result of a fall from a tractor-trailer.

4. [Smith] reported the incident to [BVD] and subsequently sought medical attention for his injuries at Methodist Hospital in Gary, Indiana on August 19, 2003.

5. [Smith] was forced to seek treatment at Methodist Hospital the following day due to the severity of his left shoulder pain, upon which Dr. John Diveris initiated treatment.

6. An MRI of [Smith’s] left shoulder was ordered by Dr. Diveris and same was performed on October 9, 2003, at the Diagnostic Specialties

¹ We refer to the “Single Hearing Member” and the “Full Board” when the distinction is necessary.

Center. The MRI revealed a large full thickness tear of [Smith's] left rotator cuff.

7. Based on the above findings, [Smith] underwent an arthroscopic repair of his left rotator cuff and biceps tenodesis with Dr. Diveris on October 29, 2003.

8. [Smith] subsequently underwent a course of physical therapy, but suffered a re-tear of the left shoulder [, which] was revealed on a repeat MRI.

9. Consequently, [Smith] underwent a second surgery to his left shoulder with Dr. Diveris on January 9, 2004

10. [Smith] continued to experience persistent and severe pain in the left shoulder and failed to re-establish his strength and range of motion in that shoulder, so a repeat MRI was performed in April of 2004 and it revealed a recurrent tear of the left rotator cuff.

11. As a result of these findings, Dr. Diveris referred [Smith] to Dr. Anthony Romeo.

12. Dr. Romeo initially evaluated [Smith] on April 30, 2004 and noted in his narrative report that full functional strength in overhead capacity would essentially be impossible at that point in time, with any future surgical intervention directed primarily at relieving [Smith's] pain.

13. On July 1, 2004, [Smith] underwent a left shoulder arthroscopy revision rotator cuff repair ... with Dr. Romeo.

14. [Smith] underwent a functional capacity evaluation (FCE) on March 24, 2005 at the Illiana Rehabilitation Services facility, where it was indicated that he was able to function at between a light and medium category of work, which is indicative of a 2-hand maximum frequent lifting capacity of twenty-three pounds (23#) from floor to waist.

15. In April of 2005, Dr. Romeo offered [Smith] a 37% upper extremity impairment rating, which equated to a 22% whole person impairment. Also at this time, Dr. Romeo gave [Smith] permanent work restrictions consisting of:

- No lifting greater than 25# frequently and 50# occasionally from floor-to-waist only;
- Push/pull limited to 100# of force; and
- No work at or above shoulder level[.]

16. [Smith] then presented to Dr. Nicole Einhorn on June 15, 2005 for an independent medical examination (IME), where she diagnosed [Smith] with the following:

1. Left shoulder recurrent rotator cuff tear;
2. Left shoulder biceps tendonitis;
3. Left shoulder A/C joint arthrosis; and
4. Left shoulder glenohumeral arthritis.

17. In her IME report, Dr. Einhorn agreed with Dr. Romeo's proffered work restrictions and she also added "no repetitive shoulder motion" as another permanent work restriction. Dr. Einhorn also opined that [Smith] was at-risk for a re-rupture with full-time use of his left shoulder, even within the restrictions given.

18. On August 4, 2005, Dr. Einhorn determined that [Smith] qualified for a 25% upper extremity impairment rating, which equated to a 15% whole person impairment.

19. Thomas Roundtree was retained by [BVD] to perform a vocational assessment and in his report of August 8, 2006, Mr. Roundtree indicated that [Smith] was capable of working at a light to medium physical demand level with restrictions in reaching and repetitive use of his left arm.

20. Thomas Grzesik was subsequently retained by [Smith] to provide a second vocational assessment opinion and in his report of December 18, 2006, Mr. Grzesik felt that [Smith] was unable to perform his pre-injury occupation as a tractor-trailer truck driver due partly to the permanent work restriction of no repetitive use of the left upper extremity. Mr. Grzesik further opined that [Smith] was limited to occupations that do not require bilateral use of the upper extremities.

21. Based on his review of the evidence, his own objective findings, and [Smith's] limited learning potential and poor academic ability, Mr. Grzesik found that [Smith] met the criteria for being permanently totally disabled, as that term is defined in *Perez v. United States Steel*.

Appellant's App. at 13-16.

On May 3, 2007, a hearing was held before the Single Hearing Member. The parties also stipulated to a list of trial exhibits that included Grzesik's records ("the Grzesik Report"). *Id.* at 17. On June 13, 2007, the single hearing member issued his findings, conclusions, and award, which provided in relevant part as follows:

FINDINGS

1. On review of the testimony of the single witness[, Smith,] and the Trial Stipulation with all of the exhibits of [Smith] and [BVD], the Single Hearing Member now finds that if the left shoulder pain with the use thereof as described by [Smith] (for doing activities/work above the waist level – or with movement of the shoulder) is true, [Smith] is now totally disabled from all reasonable employment. It is observed that it would not be reasonable to believe that Mr. Smith would be able to find or obtain a regular paying job in

his work community given all other factors of his training, education, age, experience, etc. [Smith] can fully and freely move and use his joints and bones of his fingers, hand and elbow but is limited by pain in movement and use of his left shoulder.

2. To determine if the left shoulder pain as reported is true, the reports and opinions of the professional observers (physicians, diagnosticians, physical therapists, functional capacity evaluators and vocational experts— all as set out in the listings in the Trial Stipulation (III Stipulated Trial Exhibits) have been carefully reviewed.

3. From such review, the Single Hearing Member finds that the report of such pain as set out above is true, and James Smith is now totally disabled from all reasonable employment and such condition is permanent at the time.

Id. at 5.

BVD appealed the Single Hearing Member's decision to the Full Board, which conducted a hearing on August 27, 2007. On September 25, 2007, the Full Board issued an order adopting the Single Hearing Member's decision and affirming it in its entirety. BVD appeals.

Discussion and Decision

Our standard of review is well settled:

Upon appeal from a finding of the Worker's Compensation Board, we are bound by the Board's findings of fact and may not disturb its determination unless the evidence is undisputed and leads undeniably to a contrary conclusion. It is the duty of the Board, as the trier of fact, to make findings that reveal its analysis of the evidence and are specific enough to permit intelligent review of its decision. In evaluating a decision of the Board on appeal, we employ a two-tiered standard of review. First, we review the record to determine if there is any competent evidence of probative value to support the Board's findings. We then examine the findings to see if they are sufficient to support the decision. We will not reweigh the evidence or assess witness credibility. We consider only the evidence most favorable to the award, including any and all reasonable inferences flowing therefrom. Thus, to prevail in this appeal, [BVD] is required to show that there is no probative evidence from which the Board might reasonably conclude as it did.

Shultz Timber v. Morrison, 751 N.E.2d 834, 836 (Ind. Ct. App. 2001) (citations omitted), *trans. denied*.

To establish a permanent total disability, an injured employee is required to prove that he cannot carry on reasonable types of employment. *Perez v. U.S. Steel Corp.*, 428 N.E.2d 212, 215-16 (Ind. 1981). The reasonableness of the employee's opportunities is to be assessed by his physical and mental fitness for them and by their availability. *Id.* at 216. Here, Smith bore the burden of proving that he cannot carry on reasonable types of employment to justify recovery for a permanent total disability. *See id.* Once the employee has established the degree of obvious physical impairment, coupled with other facts such as the claimant's capacity, education, training, or age, and has established that he has attempted unsuccessfully to find work or that it would be futile to search for work in light of his impairment and other characteristics, the burden of producing evidence that reasonable employment is regularly and continuously available then rests on the employer. *Walker v. State, Muscatatuck State Dev. Ctr.*, 694 N.E.2d 258, 265 (Ind. 1998). "Shifting the burden of production to the employer under these circumstances is justified because it is much easier for the employer, by virtue of its contact with the labor market, to prove the claimant's employability than it is for the employee to attempt to prove the universal negative of being totally unemployable." *Id.* at 266.

I. Specificity of the Board's Findings

BVD does not challenge the Full Board's adoption of the Single Hearing Member's decision. *See DialX-Automated Equip. v. Caskey*, 826 N.E.2d 642, 644 (Ind. 2005) (holding

that Full Board's adoption of Single Hearing Member's decision is sufficient to permit meaningful appellate review where Single Hearing Member made written findings). However, BVD asserts that the Single Hearing Member's decision provides an insufficient basis for meaningful review. BVD is correct that the Board has an obligation to enter specific findings of fact that support its ultimate conclusions of law, and the findings must be stated with sufficient specificity, with regard to contested issues, so as to allow intelligent review. *See Perez v. United States Steel Corp.*, 426 N.E.2d 29, 31-32 (Ind. 1981) (discussing in depth the rationale for requiring specific findings); Ind. Code § 22-3-4-7 (requiring the Board to "make an award and file the same with the finding of the facts on which it is based.").

Under the circumstances of this case, the Board's findings are sufficiently specific. Here, the parties submitted an extensive stipulation of facts, and the issue was limited to whether Smith was permanently and totally disabled. When we consider both the Board's findings and the parties' stipulation of facts, there is no need for us to speculate as to the Board's rationale for finding that Smith was totally and permanently disabled. The Board found that Smith was totally and permanently disabled based on Smith's testimony, which was substantiated by the professional reports to which the parties stipulated, regarding the pain he experienced in his left shoulder when doing activities/work above the waist level or when moving his shoulder. The stipulation of facts indicates that Grzesik found that Smith was limited to occupations that do not require bilateral use of the upper extremities. He further found that with this physical limitation and considering Smith's limited learning potential and poor academic ability, Smith met the criteria for being permanently and totally

disabled. Therefore, the Board's findings are sufficient to conduct an intelligent and meaningful review.

II. Lack of Probative Evidence

BVD contends that there is no competent evidence of probative value to support the Board's decision. Specifically, BVD argues that the only evidence that supports the Board's decision is the Grzesik Report, which, according to BVD, is based on assumptions unsupported by the record and therefore is not valid evidence.

We observe that BVD did not object to the admission of the Grzesik Report, but rather stipulated to its admission. Appellant's App. at 17. BVD also explicitly stipulated to Grzesik's findings that Smith was unable to perform his pre-injury occupation as a tractor-trailer truck driver, was limited to occupations that do not require bilateral use of the upper extremities, and met the criteria for being permanently totally disabled. *Id.* at 16. Although "[t]he use of stipulated evidence does not prevent the parties from arguing what the facts are and what inferences those facts reasonably support[,]" *see Corbin v. State*, 713 N.E.2d 906, 908 (Ind. Ct. App. 1999), BVD did not argue to the Single Hearing Member or the Full Board, as it does now on appeal, that Grzesik's findings were irrelevant or were based on assumptions unsupported by the record. Consequently, BVD has waived these arguments for our review. *See Mid-States Gen. & Mech. Contracting Corp. v. Town of Goodland*, 811 N.E.2d 425, 436 n.2 (Ind. Ct. App. 2004) ("An appellant who presents an issue for the first time on appeal waives the issue for purposes of appellate review."). To the extent BVD asserts that Grzesik's findings are contradicted by other evidence, these assertions are merely

an invitation to reweigh the evidence, which we must decline. Accordingly, we must reject BVD's contention that the Board's decision is unsupported by probative evidence.

III. Reasonably Available Employment

Lastly, BVD argues that even if Smith met his burden to establish the futility of seeking employment, BVD established that reasonable employment is regularly and continuously available. *See Walker*, 694 N.E.2d at 265. BVD asserts that the Roundtree report "explained that in light of the facts that Smith was a high school graduate, could drive, and resided in the large labor market of Lake County, there were jobs available that Smith could perform, including positions as cashier, a counter attendant, a security guard, a light-duty driver, food prep worker, and as a courier driver for a medical transport company." Appellant's Br. at 15. BVD claims that the Roundtree report establishes that reasonable employment is regularly and continuously available and that under *Walker*, Smith had the burden to rebut this evidence as to each individual job, which he failed to do. Smith claims that the Board weighed the available jobs offered by BVD against Smith's vocational report—the Grzesik Report—and ultimately found that Smith satisfied his burden of proving that he is permanently and totally disabled.

While there may be circumstances in which an employee is required to refute evidence of the reasonableness and availability as to each occupation established by an employer—a determination we do not make here—given the evidence in this case, we find that Smith met his burden. Our review of the Roundtree report shows that its conclusions were based on a review of Smith's medical background and an interview with Smith. *Id.* at 71-74. In

contrast, the Grzesik Report was based not only on a review of Smith's medical records and an interview with Smith, but on vocational testing as well. Thus, Grzesik was able to consider employment possibilities with specific information regarding Smith's intellectual capacity that was not available to the Roundtree expert. The vocational tests included the Multidimensional Aptitude Battery – II; the Wide Range Achievement Test, Revised Edition; and the Nelson Denny Reading Test. The Grzesik Report concluded:

The work restrictions preclude Mr. Smith from performing occupations that require repetitive use of his left upper extremity. He is unable to lift his upper extremity above 60 degrees and he has moderate difficulty handling objects with his left hand as well as frequent fatigue of the hand. It is mentioned in the FCE report that he was placed at the medium level of physical demand. This is misleading since he is limited to lifting below the waist. In essence, Mr. Smith is limited to occupations that do not require bilateral use of the upper extremities. He does not have any semi-skills that could be transferred to occupations commensurate with his work restrictions. Although Mr. Smith was found not to have difficulty with standing or walking, the overall evaluation found him to be limited to only occasional standing and occasional walking. The standing and walking restrictions by themselves would eliminate virtually all unskilled occupations at the light and above physical demand level. His limited learning potential and poor academic ability would preclude him from performing occupations that require reading, spelling, and arithmetic such as a security guard.

Id. at 86-87. At most, the evidence is conflicting on this issue, and the Grzesik Report supports a finding that no employment was regularly and continuously available to Smith. We therefore affirm the Board's decision finding that Smith is permanently and totally disabled.

Affirmed.

BARNES, J., and BRADFORD, J., concur.